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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 283

CHARLES LONDONER,

Petitioner and Appellant below,

against

UNITED STATES OF AMERICA,

Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

ABRAHAM S. ROBINSON,
Counsel for Petitioner.

INDEX

PETITION

PAGE

Summary Statement of the Matter Involved 1

Questions Presented 2

Jurisdiction 6

Reasons Relied Upon for the Allowance of the Writ 6

BRIEF

Opinion of the Courts Below 9

Jurisdiction 9

Statement of the Case 10

Specification of Errors 10

Statutes and Regulations Involved 11

Summary of Argument 11

Argument 12

I—There was a misjoinder of several, separate and distinct conspiracies, a fatal variance in the proof and an attempt upon appeal to sustain the conviction upon a theory upon which the case was not tried 12

II—Mere knowledge or suspicion of knowledge by a manufacturer as to contemplated illegal use of the subject of sale by a buyer or consumer does not make him a conspirator with such buyer 15

III—The Trial Court was unfair and its charge was wholly inadequate 18

IV—Proof of the commission of the substantive offense does not warrant conviction for conspiracy 20

Conclusion 21

Appendix 23

CASES CITED

PAGE

Adler v. U. S., 182 Fed. 464 19

Barnett, In re, 124 Fed. (2d) 1005 20
Berger v. U. S., 295 U. S. 78 15
Brasfield v. U. S., 272 U. S. 448 20
Bruno v. U. S., 308 U. S. 287 ..... 14, 21

Christian v. B. M. R.R., 109 Fed. (2d) 103 20
Crawford v. U. S., 212 U. S. 183 20

De Jianne v. U. S., 282 Fed. 737 19

Eckert v. U. S., 7 Fed. (2d) 257 17

Falcone v. U. S., 311 U. S. 205 ..... 6, 15, 16, 17
Fort Dodge Hotel Co. v. Bartelt, 119 Fed. (2d) 253 ..... 14, 21
Frantz v. U. S., 62 Fed (2d) 737 19

Keliher v. U. S., 193 Fed. 8 19
Kreiner v. U. S., 11 Fed. (2d) 722 18

Linde v. U. S., 8 Cir., 13 Fed. (2d) 59 ..... 17, 20

Marcante v. U. S., 49 Fed. (2d) 156 15
Mattox v. U. S., 146 U. S. 140 20
McCandless v. U. S., 298 U. S. 342 ..... 6, 14, 21
Meadows v. U. S., 82 Fed. (2d) 881 20
Moore v. U. S., 224 Fed. 95 19
Morrison v. Calif., 291 U. S. 82 15

N. Y. C. R. Co. v. Johnson, 279 U. S. 310 20

Owen v. Owen, 22 Iowa 270 18

PAGE

People v. Becker, 210 N. Y. 274 18
People v. Odell, 230 N. Y. 481 18

Schilling v. Delaware & N. R. Corp., 114 Fed. (2d) 69 20

Tellman v. U. S., 67 Fed. (2d) 716 15
Terry v. U. S., 7 Fed. (2d) 28 15

U. S. v. Atkinson, 297 U. S. 157 20
U. S. v. Crimmins, C. C. A. 2d, 123 Fed. (2d) 271 ..... 17, 20
U. S. v. Dickerson, 18 Fed. (2d) 887 15
U. S. v. Dietrich, 126 Fed. Rep. 664 20
U. S. v. Groves, 122 Fed. (2d) 87 15
U. S. v. Koch, 113 Fed. (2d) 982 ..... 15, 17
U. S. v. Lotsch, 102 Fed. (2d) 35 .....
U. S. v. McConnell, 285 Fed. 164 15
U. S. v. N. Y. Cent. & H. R. R. Co., 146 Fed. Rep. 298 20
U. S. v. Peoni, 100 Fed. (2d) 401 ..... 15, 17
U. S. v. Quick, 128 Fed. (2d) 832 18
U. S. v. Sager, 49 Fed. (2d) 725, C. C. A. 2d 20
U. S. v. Silva, 109 Fed. (2d) 531 15
U. S. v. St. Pierre, 132 Fed. (2d) 837 21
U. S. v. Wills, 36 Fed. (2d) 855 15
U. S. v. Zeuli, unreported C. C. A. 2d, decided Aug. 2, 1943 ..... 16, 20

Van Gorder v. U. S., 21 Fed. (2d) 939 20

Wiborg v. U. S., 163 U. S. 632 20
Wilmington Mining v. Fulton, 205 U. S. 60 20
Wyatt v. U. S., 23 Fed. (2d) 791 15
Young v. U. S., 48 Fed. (2d) 26 ..... 15, 17

STATUTES AND REGULATIONS CITED

PAGE

Judicial Code:

Sections 240(a) and (c) as amended, 28 U. S. C. Section 347 6

United States Code:

Title 18, Section 88 23
Title 26, Section 2550(a) 23
Title 26, Section 2551(a) 23
Title 26, Section 2553 24
Title 26, Section 2554(a) (c)(2) (d) (f) and (g) 25, 26
Title 26, Section 2557(b)(1) (2) 26
Title 26, Section 3220(a) (b) (c) (e) and (f) 27, 28
Title 26, Section 3221(a) 28
Title 26, Section 3224(a) (b) and (c) 28, 29
Title 28, Section 391 19

Treasury Regulations No. 5 (1938) as follows:

Article 3 29
Article 15 29
Article 25 29
Article 62 29
Article 90(5) 30
Article 167 30
Article 182 31
Article 183 31
Article 185 31
Article 201 32

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Supreme Court of the United States:

The petition of Charles Londoner respectfully shows:

I

Summary Statement of the Matter Involved

Petitioner, Charles Londoner, was convicted by a jury after trial in the United States District Court for the Southern District of New York upon an indictment (R. 4-11) charging him, together with nineteen other defendants, with a conspiracy to violate the Internal Revenue Laws in respect of illegal trafficking in narcotics. (The statutory provisions relevant to the indictment are set forth in the appendix, pp. 23-32 hereof.) He was sentenced to serve a term of eighteen months and to pay a $5,000 fine (R. 849).

An appeal was taken by petitioner to the Circuit Court of Appeals for the Second Circuit upon grounds enumerated in the Assignment of Errors (862-872). That Court affirmed the conviction of the petitioner, Judge Frank dissenting in a separate opinion (910-918).

Appropriate motions to dismiss the indictment and for a severance were made by this petitioner at the trial, both in the course of the Government's case as well as at the close of the entire case (R. 27-29, 322-324, 607, 767-771). By the Trial Court's ruling, made in the interests of expedition, motions made by any defendant enured to the benefit of all (R. 28, 29, 340, 600-610, 611, 757, 767, 770).

Pertinent references to the record are hereinafter made, where appropriate, in the discussion of those matters to which such references relate.

Questions Presented

1. Was it proper to join in one indictment, as a single conspiracy under one count, separate and distinct conspiracies, and to offer proof of several conspiracies which differed as to content and personnel and one of which, even assuming the sufficiency of proof, would constitute no crime?

The separate conspiracies contended by the Government to be criminal were these:

a. To make morphine synthetically (R. 19, 21);

b. To extract narcotics for illegal use from tax-exempt preparations of limited narcotic content (R. 22);

c. To divert opium (R. 23-25). Some explanation is warranted with respect to this alleged conspiracy. The Government claimed that sales of lead and opium wash, a tax-exempt preparation, would be made by

the defendant Leading Drug Company, a manufacturing chemist with which this petitioner was identified (R. 561-563), through jobbers, defendants Al N. Fox and Max Fox, who, as selling agents, would sell to retail druggists, defendants Cohen and others, who, in turn, would sell to the defendant Liss (R. 305, 330, 341, 313, 331, 349). Liss, according to the Government, would, in turn, reroute the lead and opium wash to the primary source, i. e., the manufacturing chemist, who would then similarly resell the same wash (R. 24-25). The theory was that the defendant Leading Drug Company, by showing in its return to the Government such sales, would be able to obtain additional quantities of opium used in the manufacture of lead and opium wash, which opium would then be channeled into improper uses (R. 24);

d. To sell lead and opium wash for other than medicinal purposes, and to violate regulations requiring that all dealers of such wash have a narcotic number, i. e., be registered, and further requiring the keeping of appropriate records (R. 901).

This last alleged conspiracy is one which was projected into the case for the first time by the Government in its responsive brief to the briefs of the appellants in the Court below and is the only basis upon which the Government seeks presently to sustain the conviction, although the cause was not prosecuted on any such theory (R. 901). Indeed, Judge Frank, in his dissenting opinion (R. 913), says "* * * there were in fact three distinct alleged conspiracies * * *", having reference to "a", "b" and "c" above.

This petitioner, Charles Londoner, admittedly had no connection whatever with conspiracies "a" and "b". The Circuit Court of Appeals, in the majority opinion, did not name him in connection therewith (R. 900) but did say that even had conspiracy "a" succeeded it would have constituted no crime (R. 900) and that conspiracy "b" had been

abandoned (R. 900); the Circuit Court of Appeals further admitted that conspiracy "c" had failed for want of proof (R. 901) because the vital link in the chain of alleged diversion was missing, i. e., there was a complete absence of proof that the lead and opium wash originally sold by the Leading Drug Company, with which this petitioner was identified, had ever been returned to the primary seller.

2. By reason of what has heretofore been urged under Point I, supra, may it not fairly be said that the variances between the allegations of the indictment and the proof thereof were substantial and prejudicial, hence fatal, and further because

a. The jury may have been unable to differentiate or discriminate between evidence separately applicable to some of the defendants under one or more of the separate conspiracies alleged, and cumulatively to have applied such evidence against this petitioner, notwithstanding that he was not at all named under conspiracies "a" and "b" and further notwithstanding that conspiracy "a" in any event constituted no crime, conspiracy "b" had been abandoned, conspiracy "c" had completely failed of proof, and conspiracy "d" represented a theory upon which the case had not been tried.

b. The issues were inextricably interwoven and hopelessly confused.

3. Was not the Trial Court grossly unfair in its conduct of the trial?

The conduct of the Trial Court far transcended the reasonable exercise of judicial zeal, and there was pronounced, frequent invasion of the province of trial counsel. The Trial Court manifested clear prejudice against the defendants, marked partiality for the Government and usurped the prosecutor's function by undertaking to an unwarranted degree cross-examination of defendants and

their witnesses. The Trial Court was openly contemptuous of defendants' attorneys, and his attitude reflected his partisanship. While isolated references, divorced from their context, may not fully convey the result, the cumulative effect of these references, however, project a clear picture of conduct prejudicial to the defendants to the extent of depriving them of a fair trial (R. 53, 54, 79, 80, 109, 110, 167-170, 172-174, 218, 226, 232, 234, 237-239, 245-249, 250, 259, 260, 261-275, 281, 282, 287, 288, 291, 293, 295, 296, 302, 314, 354-357, 362, 363, 377-379, 449-451, 556, 570, 571, 609-611, 672-675).

4. Did not the charge of the Court (R. 779-801), particularly in view of its conduct referred to in paragraph "3" immediately above, fail in its function in that it did not marshal any of the evidence; it failed to define, illustrate or explain the rules of law applicable to the case; it added to the confusion of the jury which already obtained; it left the jury to struggle through a morass of disconnected evidence without intelligent guidance?

5. Was not the proof insufficient to hold the petitioner under conspiracy "d" above, i. e., to sell lead and opium wash for non-medicinal purposes, since such holding would do violence to settled law that where sales are legal (as undeniably was the sale of the lead and opium wash by the firm with which petitioner was identified, through the defendants Al N. Fox and Max Fox to various retail druggists), that this petitioner could not be visited with the sins of the ultimate consumer merely because the latter might have intended a criminal use of the subject of the sale?

There was no claim here made that the petitioner had no permit to sell, or that the druggists had no permits to buy, and the Circuit Court of Appeals, in its majority opinion, conceded that the firm with which this petitioner was identified kept proper records (R. 907).

II

Jurisdiction

A

The Circuit Court of Appeals for the Second District issued its mandate herein on August 3, 1943 (R. 933).

B

Jurisdiction is here based upon the provisions of Sections 240(a) and (c) of the Judicial Code as amended, 28 U. S. C., Section 347.

C

Jurisdiction of this Court is invoked for reasons hereinafter immediately appearing.

III

Reasons Relied Upon for Allowance of the Writ Herein

The decision of the Circuit Court of Appeals, Second Circuit, is in direct conflict with the applicable law established by this Court and by various Circuit Courts of Appeal. *U. S.* v. *Falcone,* 311 U. S. 205; *McCandless* v. *U. S.,* 298 U. S. 342.

The majority opinion betrays doubt, indecision and irresolution; impliedly concedes the weakness of its reasoning but justifies its determination, despite acknowledged error in the record, in the belief entertained by a majority of the Court that some of the defendants were guilty (R. 906).

Such doubt and irresolution find further expression in the reversal by the Court below, upon a rehearing, of its original determination affirming the conviction of the defendant Rudy, and upon such rehearing dismissing the indictment as to him (R. 932).

The rules of law having application, discussed in the annexed brief, are:

1. It is error to permit the joinder in a single count of separate, several and distinct conspiracies, and to offer proof of such different alleged conspiracies where several thereof differ as to content and personnel, one of which, if proved, constitutes no crime, one of which was abandoned, one of which failed utterly of proof.

2. The reception in evidence of a considerable volume of testimony dealing with the several conspiracies, in view of the indication in paragraph "1" immediately above, of the varying nature of the said conspiracies as to content, personnel and proof, constitutes harmful variance between the indictment and proof which is intensified by the Trial Court's inadequate charge to the jury.

3. The charge to the jury by the Trial Court was obscure, confusing and provided no guidance for intelligent and discriminating judgment.

4. The Trial Court was unfair because of gross bias, partisanship and partiality in favor of the Government and against the defendants; he usurped the function of the prosecutor, invaded the province of defense counsel and unduly interfered with the conduct of the defense.

5. A seller may not be held for conspiracy to make illegal use of the subject of sale where a buyer or ultimate consumer intends illegal use thereof even where the seller may be put on notice or suspicion as to the buyer's or consumer's intended use thereof and, assuredly, the seller may not be so held where he is without such knowledge.

6. The Government may not, on appeal, cognizable of the innate weakness of the record, seek to sustain the conviction upon a theory upon which the case was not tried.

and which was first urged in the Government's brief in response to the brief of the appellants in the Circuit Court of Appeals.

7. Proof of the commission of the substantive offense will not justify an indictment for conspiracy to commit the offense.

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, directing said Court to certify and send to this Court a full and complete transcript of the records and proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 1863, Calendar No. 223, *United States of America, Appellee,* v. *Jack Liss, Appellant,* to the end that the case may be reviewed and determined by this Court as provided by the statute of the United States; and that judgment herein of said Circuit Court of Appeals be reversed by this Court and for such other and further relief as to this Court may seem proper.

Dated, August 23, 1943.

CHARLES LONDONER,
By ABRAHAM S. ROBINSON,
Counsel for Petitioner.